Supreme Court, U.S.
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No. 79-509

In the Supreme Court of the United States

OCTOBER TERM, 1979

EXXON CORPORATION,

Appellant,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Appellee.

On Appeal From the Supreme Court of Wisconsin

BRIEF OF APPELLANT IN RESPONSE TO BRIEFS OF MULTISTATE TAX COMMISSION AND STATES OF ILLINOIS, ET AL., FILED AS AMICI CURIAE

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INTRODUCTION

Briefs have been filed as Amici Curiae in opposition to Appellant's position by the Multistate Tax Commission ("MTC"), on motion granted without Appellant's consent, and by the States of Illinois, et al. ("Ill., et al.") with neither consent nor motion being required.*

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* Frank M. Keesling has also filed an Amici Curiae brief pursuant to a motion allowed by this Court. Appellant's Objection To Motion Of Frank M. Keesling For Leave To File Brief Amici Curiae shall constitute Appellant's response to that brief.

This responding brief of Appellant is designed simply to identify in summary fashion, the legal and factual deficiencies and errors in these two Amici Curiae briefs. To avoid repetition, Appellant incorporates herein by reference the issues involved, the factual statements and the legal arguments and citations, all as set forth in the Brief of Appellant and the Reply Brief of Appellant filed with this Court in this case.

DEFICIENCIES AND ERRORS

The deficiencies and errors fall into three categories.

First, Amici Curiae, in effect, argue that expediency and convenience in the assessment of state income taxes and of taxes measured by income must prevail at all costs and that Appellant's position will impair such expediency and convenience. Under this contention, the issue of constitutionality is thrust aside by Amici Curiae.

Second, Amici Curiae have misconstrued the import of the decisions of this Court and of many other courts in an effort to avoid the constitutional issues being asserted by Appellant.

Third, Amici Curiae have injected matters not in the record in this case, have omitted consideration of or misconstrued certain important facets of the record, and have made speculative arguments inconsistent with the record.

ARGUMENT

The comments and observations of Appellant are set forth below under the three categories described above.

A. The Expediency and Convenience Proposition:

The theme of expediency and convenience is expounded and maintained throughout both Amici Curiae briefs. (MTC Br. pp. 2, 3, 4, 6, 43-44; Ill., et al. Br. pp. 1, 4, 5) The components of this expediency and convenience theme, as asserted by Amici Curiae, are (1) that, apparently for all practical purposes, all multistate corporations are automatically unitary, (2) that, therefore, the apportionment formula method of tax determination *must* prevail over any other method of tax accounting, including either geographic or separate functional accounting, and (3) that to permit separate functional accounting as employed by Appellant in this case would impair or destroy the convenience of apportionment to which Amici Curiae are dedicated. (MTC Br. pp. 3, 6, 38, 40-41, 44, 62-63, 67, 73-74, 88, 92; Ill., et al. Br. pp. 3, 4-5, 10, 11-12)

The compelled and only inference to be drawn from the foregoing is that expedience and convenience in the process of state tax assessments are, in and of themselves and without more, sufficient to withstand a constitutional challenge. This is not and never has been the law.

B. Misconstruction of Court Decisions:

In supplementation of the theme described in Subcaption A above, Amici Curiae advance a number of untenable legal propositions.

(1) By means of a rather subtle literary pattern, Amici Curiae seek to convey the impression that the terms "unitary" and "integral part of a unitary business", on the one hand, and "integrated" and "vertically integrated", on the other hand, are equivalent or synonymous terms and that, as a terminology group, they have achieved the statute of legal terms of art. (MTC Br. pp. 6, 7, 9, 10, 14, 30, 31, 36, 39, 42, 59, 61-63, 67, 91; Ill., et al. Br. pp. 9-10) This Court has never announced any such proposition, and the record in this case is to the contrary (A. 491-496).

(2) Amici Curiae, in a most persistent manner, seek to establish the proposition that the apportionment method of tax assessment has been legally sanctified as the *only* accepted method for the determination of taxable income. (MTC Br. pp. 7, 8, 39-40) To the contrary, this Court has only ruled that apportionment, as a reasonable approximation of taxable income, is legal if and when other methods fail to isolate and identify income derived within the taxing state. Appellant is not challenging those decisions.

(3) Amici Curiae first reach the argumentative plateau that all multistate businesses, or at least all vertically integrated corporations like Appellant, are unitary and, hence, apportionment is the only permissible method of assessment. They then arbitrarily reach the argumentative conclusion that situs income derived from Appellant's Exploration and Production function must be included in apportionable income, suggesting in this argumentative process that this is only a matter of state law and that Wisconsin was wrong in even excluding third-party sales at the well head. (MTC Br. pp. 9-10, 41, 44, 65, 92-93; Ill., et al. Br. pp. 4-5, 10) This Court has never ruled that either unitary or apportionment are *per se* concepts to be automatically applied to all income of multistate corporations, and, more importantly, this Court has never dealt with the issue of production situs income of multifunctional oil and gas companies, which is the principal issue in this case. (In Ill., et al. Br. p. 10, the decision of the Supreme Court of South Carolina in *Exxon Corp.* v. *South Carolina Tax Commission* is cited as an authority without noting that this case is on appeal to this Court on similar issues as are involved here.)

(4) It seems clear that Amici Curiae feel that the characterization of a taxpayer as being unitary is an essential condition precedent to the application of an apportionment formula, so, in their intensive effort to establish the unitary *per se* concept, they have indiscriminately cited a rather massive group of cases to which three important exceptions must be taken. (MTC Br. pp. 39, 40, 46-58, 60, 63-74, 77-80, 90; Ill., et al. Br. pp. 3-8, 11) First, certain decisions of this Court do appear to hold that unitary is a condition precedent to applying apportionment to total multistate income, but they do *not* hold that apportionment automatically follows unitary, much less do they support, or even deal with, the contention that oil and gas production situs income is subject to apportionment in either unitary or non-unitary situations. The basic issue has always been the proper isolation and identification of taxable income, not the superficial issue of unitary. Second, some of the cited cases touching on unitary deal with *ad valorem,* net worth and capital stock taxes where the issues are those of valuation, whereas the income tax cases involve the issues of isolation and identification. These two sets of issues are incompatible. Third, all the cited cases deal with transportation, communication, distribution, manufacturing and selling and similar operations; none deal with separate functional operations such as those of Appellant.

(5) Having asserted the erroneous proposition that unitary is synonymous with multistate operations from which follows the automatic apportionment of total income, Amici Curiae deftly assert three collateral propositions: (a) that the taxation test applies only to *realized* income as contrasted to *derived* income (MTC Br. pp. 42, 59, 91); (b) that "nexus" and "reasonable relationship" are satisfied if there is even a minimal state connection with only one of a taxpayer's separate functions, thereby entitling the state to reach total income (MTC Br. pp. 41, 65; Ill., et al. Br. p. 12); and (c) that in any event a state may tax a reasonable portion of total income (MTC Br. pp. 7, 8; Ill., et al. Br. pp. 3, 12). These propositions are not and never have been the law of state income taxation.

(6) Finally, it is asserted that the constitutional test of multiple taxation is that of the fact of multiple taxation rather than the risk of multiple taxation (MTC Br. pp. 45, 88-90). This is not the law. Moreover, even if it were, it is apparent from the record here and the cases cited in Appellant's Briefs that multiple taxation will result if the decision of the Wisconsin Supreme Court is not reversed.

C. Departures From The Record:

It is important to set the record straight as regards certain elements of the Amici Curiae briefs.

(1) With almost fanatical intensity, Amici Curiae attack all separate accounting, in general, and the separate functional accounting of Appellant, in particular, as being inappropriate for state income tax purposes, challenging in the process the validity and integrity of Appellant's separate functional tax accounting and its internal functional transfer prices on the speculative grounds that they

are or could be infested with errors, manipulation, arbitrary cost allocations, hypothetical transfer prices, etc., coupled with the assertion that, in any event, corporate financial accounting is not acceptable for tax accounting purposes. (MTC Br. pp. 4-7, 9, 15, 19, 25, 28, 29, 30-32, 35, 41-44, 63, 85-87, 90-92; Ill., et al. Br. pp. 6, 8) The very vigor of these arguments suggests their frailties. First, Amici Curiae choose to overlook the facts that the record here clearly shows: (a) that Appellant did not use corporate accounting in this case; (b) that Appellant's accounting in this case was tax accounting adjusted to the Wisconsin basis pursuant to Wisconsin law; (c) that Appellant's internal transfer prices were real, third-party equivalent prices, not hypothetical; and (d) that the validity and integrity of Appellant's separate functional accounting and internal transfer prices were never challenged, and, in fact, were practically conceded. Second, by such a glaring departure from the record in this case, it is patently clear that Amici Curiae are seeking to make new law by utterly condemning separate functional tax accounting in an effort to make the expediency and convenience of apportionment taxation the paramount, if not the only, method for state income taxation, ignoring in the process the law of this Court that apportionment is *permitted* only if isolation and identification of taxable income by other means fails.

(2) In a rather mystifying digression, Amici Curiae expound on the superior merits of a three-factor apportionment formula over a single-factor formula, with Appellant being charged with having taken the position that if the result from the use of separate functional accounting is less than that produced by the application of a three-factor formula, then the latter must automatically be wrong. (MTC Br. pp. 9, 65, 66, 82-84; Ill., et al. Br. p. 12) The

record, however, is eminently clear (a) that Appellant has raised no issue as to the relative merits between various types of apportionment formulae, (b) that Appellant has carefully and deliberately made clear that it is not challenging the propriety of using an *appropriate* apportionment formula under *appropriate* circumstances, and (c) that Appellant, having fulfilled the burden of both isolating and identifying Wisconsin taxable income, as well as isolating and identifying extraterritorial income, by separate functional tax accounting, merely compared those results with the Wisconsin apportionment results to demonstrate and quantify the extent of the Wisconsin overreach.

(3) In a complete and unwarranted departure from the record in this case, Amici Curiae dwell at length on data related to Senate hearings involving the petroleum industry. (MTC Br. pp. 32-35 and fn. 12 to p. 39, 62; Ill., et al. Br. pp. 8, 9) It is obvious on their face that this data involved legislative issues, concerns and considerations not relevant to the question of whether or not it is constitutional for Wisconsin to tax situs income earned from operations in other states, and the Wisconsin Circuit Court below summarily and properly rejected Appellee's effort to inject this data into the record in this case (JS App. 47-49), which ruling was not appealed to the Wisconsin Supreme Court.

CONCLUSION

For all the foregoing reasons, the briefs of Amici Curiae, MTC and Ill., et al., should be wholly disregarded by the Court in its consideration of the issues on appeal in this case.

Respectfully submitted,

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